January 19, 2001

Memorandum M - 37005

To: Secretary
Director, Bureau of Land Management

From: Solicitor

Subject: Whether Public Lands Withdrawn by Executive Orders 6910 and 6964 or Established as Grazing Districts are "Reservations" within the Meaning of Section 4(e) of the Federal Power Act

I. Introduction

Section 4(e) of the Federal Power Act (FPA[1]) gives the Secretary of the Interior (Secretary) authority to impose conditions on licenses issued by the Federal Energy Regulatory Commission (FERC[2]) for hydropower projects located on "reservations" under the Secretary's supervision. See 16 U.S.C.§§796(2), 797(e); see also Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). Specifically, section 4(e) provides:

> That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation

[1]Title I of the FPA was originally enacted as the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063. A 1935 amendment changed the name to the Federal Power Act. See Act of Aug. 26, 1935, ch. 687, §213, 49 Stat. 838, 863 (codified at 16 U.S.C.§ 791a). This Opinion generally refers to the 1920 Act and its amendments as the Federal Power Act or the FPA.

[2]In 1977, the Federal Energy Regulatory Commission replaced the Federal Power Commission (FPC), which had been established by the Federal Power Act. See 42 U.S.C. § 7172(a).

> falls shall deem necessary for the adequate protection and utilization of such reservations.

16 U.S.C. § 797(e).

This conditioning authority was reserved to the Departments of the Interior, Agriculture and War at the time the FPA was enacted to allow, in the words of the U.S. Supreme Court, "the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." Escondido, 466 U.S. at 775.[3]

From its enactment in 1920, the FPA's definition of "reservations" has remained essentially unchanged[4]:

> "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public

[3]In its original form, the Federal Power Commission was composed of the Secretaries of the Interior, War and Agriculture. See FPA § 1, 41 Stat. 1063 (1920). In 1930, the Commission was changed by removing the Secretaries from membership, and substituting five appointed commissioners. See Act of June 23, 1930, ch. 572, 46 Stat. 797. The fact that the Commissioners were, in the original design, the heads of the Cabinet Departments managing most federal lands helps to provide an understanding of the issue addressed in this Opinion.

[4]The originally enacted version is found at 41 Stat. 1063-64 (1920). The definition was amended in 1935 to reflect the 1921 exclusion of national monuments and national parks from the FPA's general purview and by making plural the 1920 Act's reference to "public purpose" in the second clause. See Act of Aug. 26, 1935, ch. 687, tit. II, 201, 49 Stat. 838 (1935); see also Act of March 3, 1921, ch. 129, 41 Stat. 1353 (codified at 16 U.S.C. § 797a); H.R. Rep. No. 74-1318, at 22 (1935) The only definitions of the present act which are changed are those of "reservations" and "corporations". The definition of the former term has been amended to exclude national parks and national monuments. Under an amendment to the act passed in 1921, the Commission has no authority to issue licenses in national parks or national monuments. The purpose of this change in the definition of "reservations" is to remove from the act all suggestion of authority for the granting of such licenses.

purposes; but shall not include national monuments or national parks.

16 U.S.C.§ 796(2).

The FPA also contains a definition of "public lands," which also has remained essentially unchanged since 1920: " 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations,' as hereinafter defined." 16 U.S.C.§ 796(1). The FPA's drafters appeared to assume that these terms "(reservations and public lands)" would together describe all of the lands owned by the United States subject to the Commission's licensing authority.

This Office has previously determined that the Secretary has the authority under section 4(e) of the FPA to issue conditions for hydropower projects located on several categories of Bureau of Land Management (BLM) lands, including the Oregon and California and Coos Bay Wagon Road lands (O&C Act lands), Wilderness Study Areas, and Public Water Reserve (PWR) No. 107 lands. See Memorandum from Associate Solicitor, Energy and Resources, to Director, BLM, on " 'Reservations' and the Public Lands under the Federal Power Act" (Aug. 16, 1985) [hereinafter "1985 Opinion"]. The BLM has also considered numerous other categories of lands as "reservations" for purposes of the FPA, including National Petroleum Reserve lands, California Desert Conservation Area lands, Areas of Critical Environmental Concern, Outstanding Natural Areas, Wild and Scenic Rivers designations, Land Utilization Project lands, Watershed Reserves, and Designated Wilderness Areas. See Letter from Robert F. Burford, Director, BLM, to Hon. Richard H. Lehman, House of Representatives (Mar. 23, 1988) [hereinafter "Burford letter].": The BLM accordingly has in some cases formulated section 4(e) conditions on licenses for hydropower projects on such lands, just as federal land management agencies like the Forest Service, Fish and Wildlife Service, and Bureau of Indian Affairs have formulated conditions under section 4(e) for the federal lands under their management jurisdiction. See, e.g., Southern Cal. Edison v. FERC, 116 F.3d 507, 518 (D.C. Cir. 1997) (discussing BLM section 4(e) conditions for lands within a watershed reserve).

The question this Opinion addresses is whether "reservations" under the FPA includes lands managed by the BLM which are (a) "withdrawn . . . and reserved" by Executive Order 6910 (Nov. 26, 1934) and Executive Order 6964 (Feb. 5, 1935), or (b) established as grazing districts under the Taylor Grazing Act (TGA). (For simplicity, this Opinion refers to the lands reserved by the Executive Orders and the lands within grazing districts collectively as "TGA lands.")

The Associate Solicitor concluded in 1985 that TGA lands are not "reservations" within the FPA's definition. See 1985 Opinion at 5. This has been the position of the Department ever since (see, e.g., Burford letter, supra), but it has not gone unquestioned. The issue was noted in a House Committee Report in 1988. H.R. Rep. No. 100-950, pt. I, at 3 (1988) (Secretary "does not appear" to have section 4(e) authority over "Taylor Grazing lands"[5]); see also id. at 11 n.2

[5]It appears that the Committee Report's statement regarding "Taylor Grazing lands" was directed solely to lands established as grazing districts, and not to lands that are withdrawn by the Executive Orders of 1934/35. Compare H.R. Rep. No. 100-950, pt. I, at 3 (1988) (reporting that "Taylor Grazing lands . . . account for 34% of the BLM lands") with 1997 Public Land Statistics 9 tbl.5 (reporting that 34% of the public lands under the

(minority report noting that "when the FERC was asked to respond to questions about its 4(e) authority, it treated all BLM lands as if they were reserved or withdrawn from the public domain)"; Amendments to Federal Land Rights-of-Way Authorities: Hearing on H.R. 3593 Before the Subcomm. on Nat'l Parks and Public Lands of the House Comm. on Interior and Insular Affairs, 100th Cong. 149 (1988) (FERC told the Committee that it had not been resolved whether lands administered by the BLM are "reservations" for the purposes of the FPA and said "[f]or the purposes of answering these questions, BLM lands will be treated as reservations").

In 1989, while addressing the question of whether BLM and the Forest Service had authority to require FERC-licensed hydroelectric projects located on lands under their management to obtain rights-of-way under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761, the Comptroller General stated that "[u]nder the FPA's definition of 'reservation,' all of the . . . 'public lands' (other than national monuments and parks), over which BLM has jurisdiction, are reservations. " See "The FPA, FLPMA, and the Respective Roles of FERC and the Land Management Agencies," Dec. Comp. Gen. 2, B-230729 (July 7, 1989). The Comptroller General's statement that BLM public lands qualify as FPA reservations did not go unnoticed by the BLM or Congress.

---

exclusive jurisdiction of the BLM were within grazing districts).

A few weeks later, Chairman Dingell of the House Committee on Energy and Commerce wrote the Secretaries of the Interior and Agriculture and the Chairman of FERC asking them for their views and comments on the CG's Opinion. Letter from John D. Dingell, Chairman, House Comm. on Energy and Commerce, to Secretary of the Interior Manuel Lujan, Jr., et al. (July 31, 1989). BLM Director Cy Jamison later wrote Congressman Lehman, saying that "[s]ince the Comptroller General's opinion provides only a conclusion on this question, we cannot accept that position at this time. We are asking the Solicitor's ffice to re-examine this question and will advise you of the conclusion reached." Letter from Cy Jamison, Director, BLM, to Hon. Richard H. Lehman, House of Representatives (Oct. 30, 1989). The BLM Director had earlier asked the Associate Solicitor for "re-examination of this issue in light of the Comptroller Generals" Opinion and advise [sic] whether your 1985 Opinion should be modified. We would like to accept the Comptroller General's Opinion." Memorandum from Director, BLM, through Deputy Assistant Secretary, Land and Minerals Management, to Associate Solicitor, Energy and Resources (Sept. 18, 1989).[6]

Attorneys in what was then the Division of Energy and Resources subsequently drafted a memorandum for the Associate Solicitor's signature which concluded that the issue "is not susceptible to a ready response. Arguments may be advanced to support either a positive or a negative response to [the] question, but neither line of reasoning provides a definitive answer." Draft Memorandum from Associate Solicitor, Energy and Resources, to Director, BLM, on " 'Reservations' under the Federal Power Act" at 13 (June 1, 1990) [hereinafter "1990 Draft Memorandum"]. The 1990 Draft Memorandum, which was never signed, recommended adherence to the existing administrative practice of not imposing section 4(e) conditions on TGA lands until the courts provided more clarification. Id. The position expressed in the 1985 Opinion has been followed in practice by the BLM and by FERC. See, e.g., Idaho Water Resource Board, 84 FERC ¶ 61,146, at p. 61,792 & n.20 (1998); Henwood Assocs., 50 FERC 61,183, at p. 61,556 & n.53 (1990); id. at 61,573 (Trabandt, Comm, dissenting).

Ongoing and upcoming FERC licensing proceedings for new and previously-licensed hydropower projects has led the BLM to ask me to fully review this question and provide definitive guidance. This opinion is the result. After careful consideration, and for the reasons set out below, I conclude that the TGA lands are "reservations" for purposes of section 4(e) of the FPA. Because the term "reservations" is, as the Supreme Court has noted, "artificially" defined in the FPA to carry out the specific purposes of section 4(e), my conclusion is limited to that context. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960). For example, this conclusion does not mean that TGA lands qualify as reservations or reserved lands carrying with them federal reserved water rights. Therefore the conclusion in a previous Solicitor's Opinion, 86 Interior Dec. (I.D.) 553, 592 (1979), that "no reserved water rights were created by the [Taylor Grazing] Act,"[7] is not affected by this Opinion, which is strictly based on and

[6] At least one academic commentator has also questioned whether withdrawal of BLM lands for classification purposes might create reservations for purposes of section 4(e). See Teresa Rice, Beyond Reserved Rights: Water Resource Protection for the Public Lands, 28 Idaho L. Rev. 715, 741 (1991-92) ("The status of these lands under section 4(e) is not clear.").

[7] Cf. Pamela Baldwin, Congressional Research Service Report for Congress: Legal Issues Related to Livestock Watering in Federal Grazing Districts (Aug. 30, 1994) (hereinafter, CRS Report).

limited to the meaning of "reservations" for purposes of the FPA.

II. Background: Nineteenth Century Land Laws, the Taylor Grazing Act, and the "Withdrawal " of the Public Lands

The congressional intent behind the FPA's definition of "reservations" is illuminated by the history of the FPA in relation to the contemporary federal public lands policy and laws. From the early days of the Republic throughout nearly all of the nineteenth century, the basic policy regarding public lands was to dispose of them. The laws providing for their disposition were commonly referred to as "the public land laws." They included the so-called entry acts (such as the preemption and homestead statutes) which, when fully complied with, resulted in the divestiture of title to public lands to individuals. They also included laws governing transfers to corporations, such as the railroad land grant acts.

By the end of the nineteenth century, however, public lands policy was evolving toward retention of many public lands in federal ownership, accomplished through the "withdrawal" of lands from the application of the public land laws, and also sometimes the "reservation" of lands for particular purposes. Withdrawals were accomplished both by the Congress and the Executive. See United States v. Midwest Oil, 236 U.S. 459 (1915). By 1901, about 50 million acres of the public domain had been withdrawn as forest reserves. Within a few years, that figure had about tripled.[8] In 1910, Congress delegated broad withdrawal and reservation authority to the Executive under the authority of the Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910) (codified at 43 U.S.C. § 141 (repealed 1976) (also called the General Withdrawal Act).[9]While the FPA was being debated in Congress, many of the "public land laws" providing for private appropriation and disposal of the public domain were still in effect, and new ones were still being enacted. For example, the Stock-Raising Homestead Act, enacted in 1916, eventually resulted in the disposition of title (other than minerals, which were reserved to the United States) of some thirty million acres of federal land.[10] The FPA's legislative history reflects congressional awareness of the fact that public lands policy was then in a transitional period between disposal and retention, and the definitions in the Act reflected this awareness.[11]

---

[8] See George Cameron Coggins et al., Federal Public Land and Resources Law 111-12 (4th ed. 2000). National parks were reserved as early as 1872, when Yellowstone was set aside as a public park or pleasuring-ground," Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32 (1872) (codified at 16 U.S.C. § 21); national forests were reserved beginning in 1891 with the General Revision Act, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified as amended at 16 U.S.C. § 471) (repealed 1976); and federal wildlife refuges were reserved at least as early as 1903, when Pelican Island was set aside, Exec. Order of Mar. 14, 1903.

[9] Other federal laws contained more specific withdrawal and reservation authority. See, e.g., Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C.§§ 431-33).

[10] See Coggins et al., supra note 8, at 80. At least ten million acres of public domain were entered every year up until 1922; although entries decreased thereafter, they amounted to as much as 5 million acres in 1931. See Marion Clawson, The Federal Lands Revisited 35 (1983).

[11] See, e.g., H.R. Rep. No. 64-66, pt. 2, at 25 (1916) ("Development of Water Power: Views of the Minority") (Until now the national policy has been to convey the absolute title to the land in whatever way it may

During this era the distinction between "public lands" on the one hand, and "withdrawn" and "reserved" lands on the other, was generally apparent. As described in the 1934 House Committee Report on the bill that would become the TGA, "[t]hese public lands form a vast domain . . . . Their surface is now and always has been a great grazing common free to all users. The grazing resources of these lands are now being used without supervision or regulation . . . . "H.R. Rep. No. 73-903, at 1 (1934); see also Omaechevarria v. Idaho, 246 U.S. 343 (1918).

However, the distinction between "public lands," and "reserved" and "withdrawn" lands became thoroughly blurred with enactment of the TGA later that year and the events that followed in its wake. Pub. L. No. 73-482, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C.§§ 315-315r). As noted by a leading public land historian (and the BLM's first Director):

> One consequence of the establishment of permanent types of federal land units by reservation of public domain was to create some confusion as to the meaning of the latter term. . . . [The term 'public domain'] gradually came to be applied to the land not yet reserved or set aside for continued management. . . . With the passage of the Taylor Grazing Act, even this land is in a sense reserved.

Marion Clawson & Burnell Held, The Federal Lands: Their Use and Management 29 (1957); see also Baldwin, CRS Report, supra note 7 (examining the legislative, judicial, administrative and historical support for categorizing TGA lands as reserved).

Although the story is complex in its details, as discussed in the next few paragraphs, the bottom line for purposes of the legal question before me is simple: TGA lands are "withdrawn, reserved or withheld from private appropriation and disposal under the public land laws" in terms that fit the definition of "reservations" in the FPA. 16 U.S.C. § 796(2).

---

be disposed of. But it is now proposed to hold the title to the land in the Federal Government and lease it on long leases. This would be a radical change in Governmental policy.)".

The TGA authorized the Secretary to "establish grazing districts" on the "vacant, unappropriated, and unreserved lands" of the United States. § 1, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. § 315). It also provided that public notification of a proposal to establish grazing districts "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement." Id. at 1270. That Act originally limited the creation of grazing districts on public lands to eighty million acres. See id. at 1269. Because, as the Supreme Court put it, "the Taylor Grazing Act as originally passed in 1934 applied to less than half of the federal lands in need of more orderly regulation,§ "Andrus v. Utah, 446 U.S. 500, 513 (1980), President Franklin Delano Roosevelt turned to his authority under the Pickett Act of 1910.[12]

FDR issued two sweeping executive orders that effectively withdrew all the public lands from disposal. The first order applied to twelve States in the far West. See infra note 13. In those States, all "vacant, unreserved and unappropriated public land [was] . . . temporarily withdrawn from settlement, location, sale or entry and reserved for classification" for "the purpose of effective administration of the provisions of [the TGA]. Exec. Order No. 6910 (Nov. 26, 1934), reprinted in 54 I.D. 539 (1934). A little more than two months later, FDR acted again. This time he ordered "all the public lands" in twelve other States "temporarily withdrawn . . . and reserved for classification" for "the purpose of the effective administration of the [Land Program authorized by title II of the National Industrial Recovery Act of 1933 (NIRA), ch. 90, § 202, 48 Stat. 195, 201]." Exec. Order No. 6964 (Feb. 5, 1935), reprinted in 55, I.D. 188, 189 (1935).[13] FDR's orders led to this terse conclusion in the General Land Offices 1935 Annual

[12]The Pickett Act of 1910 authorized the Executive to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals". § 1, 36 Stat. 847 (repealed 1976). "[S]uch withdrawals or reservations shall remain in force until revoked by [the President] or by an Act of Congress," id., and therefore in law and in practice Pickett Act withdrawals can continue indefinitely. See, e.g., Mecham v. Udall, 369 F.2d 1, 4 (10th Cir. 1966).

[13]Unlike the 1934 Executive Order, which withdrew "all of the vacant, unreserved and unappropriated public land" (emphasis added) in AZ, CA, CO, ID, MT, NV, NM, ND, OR, SD, UT, and WY, the 1935 Executive Order withdrew "all the public lands" in AL, AR, FL, KS, LA, MI, MN, MS, NE, OK, WA, and WI, though it

Report: "Because of the withdrawals made by the Executive orders . . . there were no unreserved public lands at the close of business on June 30, 1935." 1935 G.L.O. Ann. Rep. 12.

Acting in the wake of FDRs "Executive Orders, Congress amended section 7 of the TGA in June of 1936 to provide for the further classification of the lands" withdrawn . . . and reserved by these Orders or within grazing districts:

> [T]he Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, . . . and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws . . . . Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws . . . may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act.

Act of June 26, 1936, ch. 842, § 2, 49 Stat. 1976 (codified as amended at 43 U.S.C. § 315f).

Several decades later, the Supreme Court came to address this mid-1930s activity in Andrus v. Utah, 446 U.S. 500 (1980). It noted that the discretionary classification authority Congress gave the Secretary in the 1936 amendment to section 7 of the TGA "was consistent with the dominant purpose of both the Act and Executive Order No. 6910 to exert firm control over the Nation's land resources through the Department of the Interior." 446 U.S. at 519. The Court characterized the effect of these actions this way: "In sum, the Taylor Grazing Act, coupled with the withdrawals by Executive Order, 'locked up' all of the federal lands in the Western States pending further action by Congress or the President, except as otherwise permitted in the discretion of the Secretary of the Interior for the limited purposes specified in § 7. 446 U.S. at 519; see also 1937 G.L.O. Ann. Rep. 1-2 "(Since the passage of . . . the Taylor Grazing Act, as amended . . . , and the withdrawal of the public lands from entry by Executive orders . . . , the

---

specifically exempted from its effect all "[p]ublic lands . . . which are on the date of this order under an existing reservation for a public purpose . . . so long as such existing reservation remains in force and effect." The slight change in language in the 1935 Order might have been the result of some of the confusion that had resulted from the language of the 1934 Executive Order. See Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935); Executive Withdrawal Order of November 26, 1934, as Affecting Mineral Permits and Leases and Rights of Way "Vacant, Unreserved, and Unappropriated Public Land" Construed, 55 I.D. 211 (Feb. 20, 1935).

work of the General Land Office has undergone a very decided change. Conservation rather than disposals is the dominant note in the administration of the public lands under existing laws.)".

The vast majority of the lands withdrawn by the 1934 Executive Order (No. 6910) were later included within grazing districts.[14] Once so included, they were removed from the application of the 1934 Order. See Exec. Order No. 7274 (Jan. 14, 1936), reprinted in 55 I.D. 444 (1936) (amending Executive Order 6910 "by excluding from the operation thereof all lands which are now, or may hereafter be, included within grazing districts duly established . . . so long as such lands remain a part of any such grazing district)". Of course, these lands remain withdrawn by the terms of the TGA itself "from all forms of entry of settlement" and "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry". 43 U.S.C. §§ 315, 315f; see also 43 C.F.R. § 2400.0-3 (1999) "(Classification under section 7 [of the TGA] is a prerequisite to the approval of all entries, selections, or locations" on BLM lands, with certain exceptions). Lands covered by the 1934 Executive Order that are not within grazing districts remain subject to the 1934 Order and section 7 of the TGA. The 1935 Executive Order (No. 6964) generally remains applicable to the lands it withdrew and "reserved for classification." Some TGA lands also have been withdrawn or reserved for other purposes.

In a variety of instances, public lands initially "withdrawn . . . and reserved" by the 1934/35 Executive Orders were subsequently opened to entry and disposal through the TGA's classification process. Usually such lands were specifically classified (or reclassified) in order to dispose of them. The net effect is that basically all the public lands that have been classified and opened to disposal have either been disposed of or have since been reclassified for retention. See, e.g., Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 876 (1990) (by 1970, "virtually all of the country's public domain . . . had been withdrawn or classified for retention) (citing Public Land Law Review Comm'n, One Third of the Nation's Land 52 (1970)); 43 C.F.R. § 2400.0-3(a) (1999, adopted in 1970) ("All vacant public lands, except those in Alaska, have been, with certain exceptions, withdrawn from entry, selection, and location under the non-mineral land laws by [the Executive Orders of 1934/35] . . . and by the establishment of grazing districts . . . ."). In FLPMA, enacted in 1976, Congress firmly stamped its imprimatur on this evolution when it declared as "the policy of the United States that (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a); see also id. § 1712 (development, maintenance and revision of land use plans).

[14]The most recent available information is that nearly 135 million acres of BLM land are within grazing districts, leaving a little more than 43 million acres of BLM land in the lower 48 States outside of these districts. See 1999 Public Land Statistics 13-14 tbl.1-4 "(Public Lands Under Exclusive Jurisdiction of the Bureau of Land Management, Fiscal Year 1999").

III. The Plain Language of the FPA

The FPA's definition of "reservations" refers to "lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." 16 U.S.C. § 796(2) (emphasis added). BLM lands that have been established as grazing districts, as well as BLM lands that continue to be governed by the Executive Orders, all seem to fit squarely within the plain meaning of this definition. That is, because TGA lands are not "subject to disposition, settlement, or occupation until after the same have been classified and opened to entry," 43 U.S.C. § 315f, they would seem properly to be considered "reservations" under the FPA, 16 U.S.C. § 796(2).

IV. The Legislative History of the FPA

The FPA's legislative history supports this plain meaning. The proviso of section 4(e) was derived from House Bill 16673, 63d Cong., 2d Sess. (1914), which provided, in pertinent part, that hydropower projects could be permitted on federal reservations upon a finding by the "chief officer of the department under whose supervision . . . [a] reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such . . . reservation was created or acquired." H.R. Rep. No. 63-842, at 1-2 (1914). This bill did not define the term "reservations," however, which resulted in some discussion on the House floor over the exact scope of that term. The discussion reflected a general agreement that Executive withdrawals under the Pickett Act were properly described by the terms "withdrawn" and "reserved." See, e.g., 51 Cong. Rec. 13701, 13795 (1914) (statements of Rep. Ferris) (referring to Pickett Act withdrawals as "withdrawn"lands and "Executive-order reservations)"; id. at 13703 (statement of Rep. Mondell) (The term 'reserved' is used to designate lands that are withdrawn temporarily under some form of withdrawal, such as the general withdrawal [i.e., the Pickett] act)".

In 1918, the Secretaries of the Interior, Agriculture, and War submitted a bill to Congress that was, with some minor modifications, enacted as the FPA two years later. See H.R. 8716, 65th Cong., 2d Sess. (1918); Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765, 773 n.15 (1984); FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111-12 (1960). The bill adopted the concept for the 4(e) proviso from House Bill 16673, and, following on the earlier discussion on the House floor, specifically defined the term "reservations" to include all lands "withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws." H.R. 8716, 65th Cong., 2d Sess. (1918). Thus, the legislative history is consistent with the idea that the FPA's definition of "reservations" includes withdrawals under the Pickett Act.

V. Judicial Guidance

The Supreme Court has determined the meaning of "reservations" in the FPA by, not

surprisingly, focusing on the statutory definition. See FPC v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960) (holding that certain lands which were part of the Tuscarora Indian Reservation were not FPA "reservations" because they were owned in fee simple by the Tribe, and thus not "owned by the United States," as required under § 3 of the FPA, 16 U.S.C. § 796(2)). As the Court there noted, "Congress was free and competent artificially to define the term 'reservations' for the purposes it prescribed in that Act[, a]nd we are bound to give effect to its definition of that term." Id.

The Supreme Court has, in sum, regarded the FPA definition as simple and straightforward: " 'Public lands' are lands subject to private appropriation and disposal under public land laws. 'Reservations' are not so subject". FPC v. Oregon, 349 U.S. 435, 443-44 (1955).[15] The Court has also concluded that lands withdrawn under the authority of the Pickett Act are reservations within the meaning of the FPA. See id. at 438 n.5, 439 n.6, 443, 444.

Lower courts have also concluded that TGA lands are withdrawn and reserved for purposes of other statutes, although they have not addressed the question in the context of the FPA. For example, in Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938), the plaintiff challenged a proposed exchange involving public lands that had been withdrawn by Executive Order 6910 and later established as a grazing district under the TGA. Applicable law permitted the United States to exchange only "unreserved and unappropriated public lands." Act of June 25, 1935, ch. 308, 49 Stat. 422 (1935). The court declared that "the exchange is not authorized by the Act "because the public lands were, since the issuance of the 1934 Executive Order, "presently reserved and appropriated lands,"rather than "unreserved and unappropriated public lands" as required by the exchange statute. 98 F.2d at 322. Other cases demonstrate a similar understanding of the status of TGA lands. See, e.g., Finch v. United States, 387 F.2d 13 (10th Cir. 1967); Carl v. Udall, 309 F.2d 653 (D.C. Cir. 1962).

[15]Some lower court opinions involving FPA hydropower licenses do not slavishly follow this terminological construct, and instead use the term "public lands" as meaning generally federal lands, even in cases where reservations like national forests are involved. See, e.g., Montana Power v. FPC, 185 F.2d 491 (D.C. Cir. 1950).

The Supreme Court's characterization of the purpose of the section 4(e) conditioning authority also sheds some light on its applicability to TGA lands. Specifically, the Court has viewed this authority as reflecting Congress's desire for "the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765, 775 (1984). These " 'special responsibilities,' " id. at 774 (quoting O.C. Merrill Memorandum[16]), are as appropriately found on BLM lands that are reserved from disposal by President Roosevelt's withdrawals or established as grazing districts, and that are currently managed under the organic authority of FLPMA, as they are on other federal lands like national forests.

[16]"O.C. Merrill, one of the chief draftsmen of the Act and later the first Commission Secretary, explained that the creation of the Commission 'will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers.' Memorandum on Water Power Legislation from O.C. Merrill, Chief Engineer, Forest Service, dated October 31, 1917, App. 371. Escondido at 774.

VI. Administrative Agency Guidance

The FPC long ago endorsed the reasoning which leads to the conclusion that TGA lands are "reservations" within the meaning of the FPA. A 1921 Opinion of the FPC's Chief Counsel (which ends with a notation, "Approved by the Commission") concluded that lands withdrawn under the Reclamation Act of 1902 qualified as FPA reservations. "Classes of Withdrawals Included in Reservations Subject to the Federal Water Power Act" (May 4, 1921), reprinted in 2 FPC Ann. Rep. 220 (1922) [hereinafter "FPC Opinion"]. The question addressed in that Opinion which is pertinent to the issue before me was whether "second form" withdrawals under section 3 of the Reclamation Act are reservations under the FPA.[17] The 1902 Act generally permitted the Secretary to "withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from [reclamation project] works," ch. 1093, § 3, 32 Stat. 388 (1902) (emphasis added). The Chief Counsel noted that while the 1902 Act essentially forbade the Secretary from withdrawing such lands under the homestead laws, it was amended in 1910 to put these lands off limits to homestead entry "until such time as the Secretary of the Interior issues public notice, which notice operates to remove them out of the classification of withdrawn lands and restores them as lands subject to entry, in conformity with the act." FPC Opinion at 221 (citing Act of June 25, 1910, ch. 407, § 5, 36 Stat. 836 (codified as amended at 43 U.S.C. § 436)). Focusing on the general language of the FPA's definition of "reservations," the Chief Counsel reasoned that these second form withdrawals are, until issuance of the public notice, lands " '*withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws*,' " and therefore qualify as FPA reservations. FPC Opinion at 221 (quoting 16 U.S.C. § 796(2)) (emphasis in FPC Opinion). This reasoning applies equally to TGA lands, which, as discussed above, "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." 43 U.S.C. § 315f; see also 43 C.F.R. § 2400.0-3 (1999).

As the FPC Counsel's reasoning shows, the determination of whether federal land has been "reserved" for purposes of the FPA is not affected by the fact that the lands could become available for entry by some future executive action. That is, the Secretary could, simply by issuing a public notice, open land that had been temporarily withheld from homesteading under the provisions of the 1910 Act, but this possibility was not enough to remove the land from the FPA's definition of reservations. Similarly, national forest lands have always been considered reservations even though until 1962, the Secretary of Agriculture retained the authority to classify them as open to entry and disposal under the Forest Homestead Act. See Act of June 11, 1906, ch. 3074, §§ 1-2, 34 Stat. 233 (1906) (codified as amended at 16 U.S.C. §§ 506, 507) (repealed 1962); Act of Mar. 4, 1913, ch. 145, § 1, 37 Stat. 842 (codified as omitted at 16 U.S.C. § 512).[18] The legislative history of the Taylor Grazing Act reflects a similar

[17] The Opinion also concluded that "first form" withdrawals under the 1902 Reclamation Act and "game preserves, bird preserves, etc." are FPA reservations.

[18] The fact that TGA lands may be disposed of by sale or exchange, for example, also does not exclude them from FPA reservation status. See, e.g., 43 U.S.C. § 1716(a) (providing that BLM and National Forest System lands may be "disposed of by exchange" where "the Secretary concerned determines that the public interest will be well served by making that exchange)"; 36 C.F.R. Pt. 254 (2000) (regulations for the sale and exchange of

understanding of the TGA lands. See, e.g., 78 Cong. Rec. 6347 (1934) (statement of Representative Ayers concerning the Taylor Grazing bill) "(the bill takes in all of the land in all of the public-domain States and puts the land into a reserve, the same as the national forest reserve. After these reserves are created in this manner, then on application to the Secretary of the Interior the lands therein may be set aside and homestead entries may be permitted upon them.)".

The Department of the Interior has also generally regarded the TGA lands to be "reserved" in a variety of contexts. For example, in 1935, the Solicitor addressed the question whether lands withdrawn by Executive Order 6910 but not included within a grazing district may be leased for grazing purposes pursuant to section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m. Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935). The Solicitor answered in the negative because section 15 authorizes the Secretary to lease only " 'vacant, unappropriated, and *unreserved* lands." ' Id. (emphasis in the 1935 Opinion). "Having been reserved by the said Executive Order," the Solicitor concluded, "they may not be leased for that purpose so long as the order remains in force." Id.[19] See also Carl v. Udall, 309 F.2d 653, 658 (D.C. Cir. 1962) (speaking of the "reservation" of land under the 1934/35 Executive Orders) (quoting Nelson A. Gerttula, A-23158 (Dec. 31, 1941)); J.A. Allison and Mark L. Johnson, 58 I.D. 227, 234 (1943) (same); Executive Withdrawal Order of November 26, 1934, as Affecting Mineral Permits and Leases and Rights of Way "Vacant, Unreserved, and Unappropriated Public Land" Construed, 55 I.D. 211 (Feb. 20, 1935) (same). And see discussion infra note 21.

Many of the TGA lands do remain subject to private appropriation pursuant to the Mining Law of 1872, see 30 U.S.C. § 22, but this does not operate to exclude them from FPA "reservation" status. The FPA has long been applied to include within its definition of reservations lands which are open to appropriation under the Mining Law, but which are otherwise withdrawn or reserved. For example, the national forests also generally remain open to mineral entry, yet they are specifically cited in the FPA's definition of "reservations" as satisfying the definition. See 16 U.S.C. § 478. See also Southern Cal. Edison v. FERC, 116 F.3d 507, 518 (D.C. Cir. 1997), where the court upheld BLM conditions imposed under the FPA's section 4(e) on lands that were "withdrawn from settlement, location, filing, entry or disposal under the land laws of the United States" to protect Los Angeles water diversions, but which were by the same statute 'at all times [to] be open to exploration, discovery, occupation, and purchase permit or lease under the mining or mineral leasing laws of the United States." Act of Mar. 4, 1931, ch. 517, §§ 1-2, 46 Stat. 1530, 1547-48 (1931). As the Supreme Court pointed out in Udall v. Tallman, 380 U.S. 1, 19-20 (1965):

National Forest System lands); Exec. Order Nos. 7048 (May 20, 1935), 7235 (Nov. 26, 1935), and 7363 (May 6, 1936), reprinted in 55 I.D. 261, 401, 502 (1935-36) (amending Executive Orders 6910 and 6964 to permit sales, exchanges and leases).

[19]Several months later, a new executive order authorized the Secretary to issue leases under section 15 of the TGA on lands withdrawn by Executive Order 6910 whenever the Secretary determined that such lands may be "properly subject to such . . . lease and [are] not needed for any public purpose." Exec. Order No. 7235 (Nov. 26, 1935), reprinted in 55 I.D. 401 (1935).

> [T]he term 'public land laws' is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both 'mining laws,' referring to statutes governing the mining of hard minerals on public lands, and 'mineral leasing laws,' a term used to designate that group of statutes governing the leasing of public lands for gas and oil. Compare Title 43 U.S.C., Public Lands, with Title 30 U.S.C., Mineral Lands and Mining.

This conclusion is consistent with the legislative intent of the FPA because the Secretary retains the kind of special responsibilities" for TGA lands that the Supreme Court has recognized as underlying the section 4(e) authority. See Escondido Mut. Water v. La Jolla Band of Mission Indians, 466 U.S. 765, 774 (1984); see, e.g., 43 U.S.C. § 1732 (directing the Secretary's management of BLM lands, including those subject to appropriation under the Mining Law).

VII. The 1985 Associate Solicitor's Opinion

The Associate Solicitor for Energy and Resources concluded that TGA lands were not "reservations" for purposes of the FPA because they "lack the necessary element of being dedicated for some public purpose." 1985 Opinion at 5. In one paragraph of analysis, the Associate Solicitor read the FPA's definition of reservations as "contemplat[ing] that a particular purpose for the lands has already been determined." Id. Because FDR's Executive Orders "only withdrew, but did not dedicate the lands for some particular usage, Taylor Grazing lands do not fall within the FPA's definition of 'reservations.' Id.

This reasoning is not persuasive. First, the statutory definition refers to withdrawals or reservations (i.e. lands "withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws"). 16 U.S.C. § 796(2); see also FPC Opinion, supra.[20] Second, TGA lands were set aside for identifiable public purposes as required by the Pickett Act (authorizing the President to "withdraw . . . and reserve" public lands for "public purposes to be specified in the orders of withdrawals," ch. 421, § 1, 36 Stat. 847 (repealed 1976)). The 1934 withdrawal was "for the purpose of effective administration of the provisions of the [TGA]," which, the Order stated, "provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and . . . provides for the use of public land for the conservation or propagation of wild life." Exec. Order No. 6910 (Nov. 26, 1934), reprinted in 54 I.D. 539 (1934).[21] The 1935 withdrawal was "for the purpose of the effective administration

[20]The Associate Solicitor's reference to lands being "dedicated for some public purpose" may have been influenced by a separate clause in the definition of reservations that refers to lands "held for any public purposes." However, this clause is separated from the rest of the definition with a semicolon and the word "also", and refers to acquired lands (i.e. "also lands and interests in lands acquired and held for any public purposes"). 16 U.S.C. § 796(2).

[21]In 1935, the Solicitor addressed the question of "whether a grazing district can be established and

of the [Land Program authorized by NIRA, 202, 48 Stat. 201]," which the Order stated "contemplates the use of public lands . . . for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges." Exec. Order No. 6964 (Feb. 5, 1935), reprinted in 55 I.D. 188-89 (1935). This Order also recognized that NIRA provides that the Land Program "shall include among other matters, the conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, and flood control." Id. at 188; see also NIRA § 202, 48 Stat. 201 (1933).[22]

Other withdrawals of public lands under the authority of the Pickett Act have long been recognized as being "reservations" within the meaning of the FPA, and no important differences exist between them and TGA lands for purposes of this analysis. The 1985 Associate Solicitor's Opinion itself recognized one important category of Pickett Act withdrawals as being FPA reservations. That is, President Coolidge invoked his authority under the Pickett Act,[23] to withdraw for public use vacant, unappropriated and unreserved public lands surrounding springs or water holes on public lands. See Exec. Order of April 17, 1926 "(Public Water Reserve No. 107"), reprinted in 51 L.D. 457 (1926). The Associate Solicitor distinguished these from the TGA lands on the ground that PWR 107 lands were "reserved" as well as "withdrawn" 1985 Opinion at 5-6. Yet like the Executive Order for PWR No. 107 lands, the TGA Executive Orders not only withdrew lands "from settlement, location, sale or entry," but also reserved the lands for public purposes under the authority of the Pickett Act. Compare Exec. Orders No. 6910 (Nov. 26, 1934) and 6964 (Feb. 5, 1935) with Exec. Order of April 17, 1926 ("Public Water Reserve No. 107"). Thus, the 1985 Opinion's differential treatment of these withdrawals is unconvincing.

The 1985 Opinion also suggested that the FPA's definition of "reservations" may have contemplated only "a 'permanent' reservation" as opposed to "temporary withdrawals" because

---

superimposed on land withdrawn under [Executive Order 6910]. "Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 I.D. 205, 209 (Feb. 8, 1935). Section 1 of the TGA generally authorizes the Secretary to "establish grazing districts . . . of vacant, unappropriated, and unreserved lands" and it prohibits the establishment of grazing districts on "lands withdrawn or reserved for any other purpose . . . except with the approval of the head of the department having jurisdiction thereof." 48 Stat. 1269 (codified as amended at 43 U.S.C. § 315). The Solicitor relied on this exception in concluding that grazing districts could be established on lands affected by Executive Order 6910 so long as the necessary approval was obtained. See 55 I.D. at 209. The Solicitor's reasoning reflected an understanding that such lands were "withdrawn or reserved for a.[] . . purpose" (and that they were not vacant, unappropriated, and unreserved lands)", 43 U.S.C. § 315.

[22]The TGA states that the purposes of grazing districts are "to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range.§ 43 U.S.C. § 315a; see also Pub. Lands Council v. Babbitt, 120 S.Ct. 1815, 1819 (2000) ("The Taylor Act seeks to "promote the highest use of the public lands,. 43 U.S.C. § 315. Its specific goals are to 'stop injury' to the lands from 'overgrazing and soil deterioration, to 'provided for their use, improvement and development,' and 'to stabilize the livestock industry dependent on the public range.' 48 Stat. 1269").

[23]See also Stock-Raising Homestead Act of 1916, ch. 9, § 10, 39 Stat. 865 (codified as amended at 43 U.S.C. § 300) (repealed 1976).

the statutory definition names military reservations and national forests.[24] I am not persuaded that any significance can be drawn from the examples used in the definition in this regard. Early legislative history indicates that Congress intended the definition of "reservations" to include all withdrawals and reservations, whether temporary or permanent. See discussion supra Part IV. The House version of the bill that became the FPA contained only the substance of the definition that appeared in the 1920 Act, without including any references to specific categories such as national forests or military reservations. See, e.g., H.R. Rep. No. 65-715 (1918). These references were added later by the Senate. See S. Rep. No. 66-180 (1919). The Supreme Court has said that "[i]t seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its 'recasting' only specified, as illustrative, some of the 'reservations' on 'lands and interests in lands owned by the United States.' "FPC v. Tuscarora Indian Nation, 362 U.S. 99, 112 (1960). The 1985 Opinion did not discuss this Supreme Court opinion.

Finally, as noted earlier, many other "temporary" withdrawals have long been considered "reservations" for FPA purposes. See, e.g., FPC v. Oregon, 349 U.S. 435, 438 n.5, 439 n.6, 443, 444 (1955). PWR No. 107 lands were, like the TGA Executive Orders, withdrawn and reserved under the authority of the Pickett Act. The 1921 FPC Counsel's Opinion acknowledged that second form withdrawn lands were only "withh[e]ld . . . from entry . . . until public announcement of the date when water could be applied." FPC Opinion at 221. And the 1985 Opinion itself said that "wilderness study areas" on public lands "must be considered as 'reservations' under the FPA" even though it recognized that the areas might become open to appropriation once wilderness studies were complete on the lands and Congress had acted on them. 1985 Opinion at 7.

VIII. The Relationship Between Section 4(e)'s Conditioning Authority and BLM's Right-of-Way Authority

The Comptroller General's 1989 Opinion, which was referred to in the introduction to this Opinion (see discussion supra p. 3), stated that all BLM-managed " 'public lands' . . . are reservations" within the meaning of the FPA. The CG was, however, addressing a somewhat different question; namely, whether BLM and the Forest Service had authority to require FERC-licensed hydroelectric projects located on lands under their management to obtain rights-of-way under FLPMA (43 U.S.C. § 1761). The CG answered this question in the affirmative, and this conclusion was accepted by FERC, Henwood Assocs., 50 FERC 61,183 (1990), but then overturned by the Ninth Circuit, California v. FERC, 966 F.2d 1541 (9th Cir. 1992).

Congress quickly responded to the 9th Circuit's decision in the Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XXIV, § 2401, 106 Stat. 3096-97 (codified at 43 U.S.C. § 1761). There Congress "reiterate[d] and clarif[ied]," albeit prospectively, the authority and responsibility of the BLM to require and condition rights-of-way for FERC-licensed hydropower projects that would occupy any BLM lands. H.R. Rep. No. 102-474, pt. VIII, at 98, reprinted in 1992

[24]This suggestion was in a footnote in its introductory background section (1985 Opinion at 3 n.3), and not in its discussion of the Taylor Grazing Act.

U.S.C.C.A.N. 2316. The House Committee Report described the purpose of the provision as to "assure" that federally-licensed hydropower projects requiring such rights-of-way "would not substantially degrade the natural and cultural resources of the affected lands, or interfere with their mangement [sic] for other purposes under applicable law." Id. at 153, reprinted at 2371.

While this statute reflects a congressional concern that BLM (along with the Forest Service) has authority to protect the resources under its management from adverse effects from federally licensed hydropower projects, this authority over rights-of-way does not duplicate BLM's authority under section 4(e) of the FPA. Most important, it essentially extends only to new projects proposed after 1992, or to existing projects that seek to expand onto additional BLM lands after 1992. See 43 U.S.C. § 1761(d). Thus, section 4(e) conditioning remains the primary means for the Secretary to insure the protection of the resources under BLM's management from the impacts of pre-1992 FPA hydropower development.

IX. Practical Effects of this Opinion

At first blush, the conclusion that the TGA lands, which comprise well over one hundred million acres of public land, ought now to be considered "reservations" under the FPA would seem to work a major change in the relicensing process. For a number of reasons, however, the practical effect of this Opinion is limited.

First, most TGA lands are in arid areas and contain few hydropower projects as a result. Second, as noted earlier, a considerable amount of BLM land is already considered a "reservation" under the FPA (e.g., O&C Act lands, Wilderness Study Areas). Third, many BLM lands are adjacent to other federal lands that have always been considered reservations under the FPA. Accordingly, BLM's conditioning authority on its lands is likely to be exercised in a manner similar to that exercised by the neighboring federal agencies, principally the U.S. Forest Service.

Finally, I have determined to make this Opinion prospective only; that is, it authorizes BLM to submit section 4(e) conditions to FERC in all future licensing proceedings,[25] and in all pending proceedings where such conditions reasonably can be formulated and submitted for incorporation into a license by FERC. I have determined not to limit the application of this Opinion simply to applications filed in the future because FERC licensing proceedings may continue for many years, and often there is considerable time at the beginning of the process when information is being gathered. Agency section 4(e) conditions generally are not even solicited by FERC until months, and in some cases years, after the license application is filed. See, e.g., 84 FERC 61,107, at pp. 61,536-38 (1998) (describing the extreme example of the Cushman Project licensing proceedings, in which conditions and recommendations were not solicited by FERC until 20 years after the proceedings were initiated). We will, however, not seek to reopen existing licenses to add section 4(e) conditions based on this Opinion.

X. Conclusion

The plain language of the FPA, its legislative history, pertinent case law, and administrative rulings all compel the conclusion that BLM-managed lands that are "withdrawn . . . and reserved for classification" by Executive Orders 6910 and 6964 and those that are established as grazing districts, are "reservations" under the FPA. Therefore, I conclude that the Secretary has authority to issue mandatory conditions on licenses issued by FERC for hydropower projects located on such lands under his jurisdiction, and the 1985 Associate Solicitor's conclusion to the contrary is hereby overruled. Accordingly, when the BLM deems that section 4(e) conditions are "necessary for the adequate protection and utilization of" Taylor Grazing Act lands, 16 U.S.C. § 797(e), it should submit them to FERC in all pending licensing proceedings where they reasonably can be formulated and submitted for incorporation into licenses by FERC, and in all future licensing proceedings.

This Opinion was prepared with the substantial assistance of Scott Miller of the Division of

25The references to licensing proceedings include proceedings for new licenses for previously licensed projects, as well as for new projects (which FERC calls "original licenses").

Indian Affairs and S. Elizabeth Birnbaum, formerly Special Assistant to the Solicitor and now Associate Solicitor for Mineral Resources, and benefitted from a careful review by Richard J. Woodcock of the Division of Land and Water.

/s/
John D. Leshy
Solicitor

I concur:

(s)Bruce Babbitt
Secretary

January 19, 2001
Date